

1 UNITED STATES DISTRICT COURT  
2 EASTERN DISTRICT OF NEW YORK

3 -----x  
4 BATALLA VIDAL, et al.,

16-CV-04756 (NGG)

5 Plaintiff's,

United States Courthouse  
Brooklyn, New York

6 - versus -

August 13, 2020  
2:00 p.m.

7 NIELSEN, et al.,

8 Defendants.  
-----x

9 STATE OF NEW YORK, et al.

17-CV-5228 (NGG)

10 Plaintiffs,

11 -versus-

12 TRUMP,

13 Defendants  
-----x

14 TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE  
15 BEFORE THE HONORABLE NICHOLAS G. GARAUFIS  
16 UNITED STATES SENIOR DISTRICT JUDGE

17 VIDEO CONFERENCE

18 APPEARANCES

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14 Proceedings recorded by mechanical stenography. Transcript  
15 produced by computer-aided transcription.

PROCEEDINGS  
STATUS CONFERENCE

(Video Conference)

THE COURTROOM DEPUTY: This is on, both cases on, Batalla Vidal versus Nielsen, and State of New York versus Trump.

State your appearances, please.

MR. AHMAD: Good afternoon. Muneer Ahmad, Professor at Yale Law school on behalf of the Batalla Vidal, plaintiffs. Also with me today is law student intern, Armando Ghinaglia. Mr. Ghinaglia is going to be doing the speaking for the most part under my supervision today.

THE COURT REPORTER: I can't hear you.

THE COURT: Let me ask that everyone place your speaker on mute until they need to speak that will help the court reporter, Ms. Teich.

Go ahead, sir.

MR. AHMAD: Thank you, your Honor. Mr. Ghinaglia will be principally speaking on behalf of the Batalla Vidal plaintiffs. I'll ask my co-counsel to introduce themselves. Once they've done that, we would like to briefly introduce our plaintiffs on the phone line.

THE COURT: All right, where is Mr. Ghinaglia?

Raise your hand.

MR. GHINAGLIA: Here, your Honor.

THE COURT: All right, I'm trying to associate names with faces. And we're in a brave new world here so it may

PROCEEDINGS  
STATUS CONFERENCE

1 take a little bit of time for all of us to successfully  
2 navigate this process. So I wish to use a term of art that  
3 will come up, a little forbearance would be appreciated on  
4 your part.

5 Go ahead, Professor.

6 MR. AHMAD: Yes, I ask Ms. Tumlin to introduce  
7 herself.

8 MS. TUMLIN: Good afternoon, your Honor, Ms. Tumlin  
9 with the Jerome Frank Legal Services Organization and for the  
10 Batalla Vidal plaintiffs. And I'll pass it to our co-counsel  
11 at the National Immigration Law Center.

12 MS. MARTINEZ-OLGUIN: Good afternoon, your Honor.  
13 I'm Araceli Martinez-Olguin with the National Immigration Law  
14 Center also for the Batalla Vidal plaintiffs.

15 MS. JOACHIN: Good afternoon, your Honor, Myra  
16 Joachin with the National Immigration Law Center on behalf of  
17 the Batalla Vidal plaintiffs.

18 THE COURT: Good afternoon.

19 MS. REBERT: Good afternoon, your Honor, Trudy  
20 Rebert with the National Immigration Law Center for the  
21 Batalla Vidal plaintiffs.

22 THE COURT: Good afternoon.

23 MS. AUSTIN: Good afternoon, your Honor, this is  
24 Paige Austin from Make the Road New York, also representing  
25 the Batalla Vidal plaintiffs.

PROCEEDINGS  
STATUS CONFERENCE

1           THE COURT: All right. And Professor, you wanted to  
2 introduce the plaintiffs who are listening in on the call.

3           MR. AHMAD: Yes, your Honor. Mr. Ghinaglia will do  
4 that if the Court will permit.

5           THE COURT: Okay. Go ahead, Mr. Ghinaglia.

6           MR. GHINAGLIA: So I just wanted to note that  
7 several of the individual plaintiffs are on the call today  
8 including, Martin Batalla Vidal --

9           THE COURT: Slowly.

10          MR. GHINAGLIA: Yes, sir.

11          Martin Batalla Vida, Antonio Alarcon, Carolina Fung  
12 Feng, Eliana Fernandez, and Carlos Vargas. And of course we  
13 have counsel and representatives from the organizational  
14 plaintiff, Make the Road New York, with us today as well,  
15 Paige Austin who introduced herself and Yaritza Mendez.

16          THE COURT: Thank you very much. On the New York  
17 State litigation representing the state.

18          MS. KHAN: Good afternoon, your Honor, Sania Khan on  
19 behalf of the plaintiff state. I want to apologize for not  
20 being able to be on video, I'm having some technical  
21 difficulties.

22          THE COURT: Thank you very much.

23          And for the defendant in both cases.

24          MR. PEZZI: Good afternoon, your Honor. Steven  
25 Pezzi on behalf of defendants in both cases.

PROCEEDINGS  
STATUS CONFERENCE

1                   MR. MARUTOLLO: Good afternoon, Joseph Marutollo  
2 from the U.S. Attorney's Office for the Government.

3                   THE COURT: Good afternoon. Thank you.

4                   Is there anyone else, any other attorneys appearing  
5 for the parties?

6                   MR. ROSENBERG: Good afternoon, your Honor. This is  
7 Brad Rosenberg. I'm a colleague of Mr. Pezzi. I'm Assistant  
8 Director of the Federal Program for the Department of Justice.

9                   THE COURT: Very good, thank you. Good afternoon to  
10 you, sir.

11                  A few housekeeping items before we go further. I  
12 advise everyone who is participating or listening to this  
13 proceeding on Cisco Webex and telephone that no recording of  
14 this proceeding of any kind is permitted under a policy of the  
15 U.S. Judicial Conference and Rule 1.8 of the Local rules of  
16 the Eastern District of New York and violators are subject to  
17 sanctions. I appreciate your cooperation in following this  
18 scripture.

19                  This proceeding as been requested by plaintiffs and  
20 so why don't we begin with a discussion of the purpose that  
21 plaintiffs have asked for this proceeding.

22                  The mandate of the Supreme Court was returned to the  
23 Second Circuit, and a mandate was returned to this Court in  
24 what we would call the DACA case. And so it brings us to the  
25 point where we must determine whether we have any additional

PROCEEDINGS  
STATUS CONFERENCE

1 proceedings that should be pursued in the district court.

2 So why don't we begin with Mr. Ghinaglia and then I  
3 will hear from the State of New York on their case and then  
4 I'll hear from the Government.

5 The Court has, just to set the state of play here,  
6 the Court has read the transcript of the case in the District  
7 of Maryland and I will be asking the parties to advise the  
8 Court as to whether there is anything about that case which  
9 impacts or addresses any of the issues in this case. And I  
10 assume that you, Mr. Pezzi, are handling these cases wherever  
11 they may arise around the country. I'll ask you to fill us in  
12 on what is happening in the other trial courts so that at  
13 least we'll have a sense of the state of proceedings in the  
14 Courts that have been involved in California, Maryland, and  
15 here.

16 Why don't we start with the plaintiffs in the DACA  
17 case.

18 MR. GHINAGLIA: Thank you, your Honor. The Supreme  
19 Court's decision in this case and decisions by other Courts  
20 made clear the Government's obligation to return to the status  
21 quo ante with regard to DACA as it was outlined in the  
22 Napolitano Memo, to accept initial applications, renewals and  
23 request for advanced parole. In response the administration  
24 put applicants in no-action buckets where they waited for a  
25 few weeks without realizing it, and before the Government

PROCEEDINGS  
STATUS CONFERENCE

1 issued a new memorandum that immediately and severely and  
2 retroactively restricted the program. And we're here because  
3 that new memo is unlawful.

4 We're concerned about real harm that tens of  
5 thousands of people, New Yorkers and people from around the  
6 country are facing. These folks depend on DACA to provide for  
7 their families to make ends meet and to pursue their dreams.

8 As someone who was in that very position, your  
9 Honor, who was once an initial applicant, a renewal applicant,  
10 even a recipient of advanced parole, I know first-hand the  
11 terrible impact that this memo will have on folks who should  
12 have the benefit of DACA; all at a time when they can least  
13 afford to go without it.

14 We're here to seek your Honor's lead to amend our  
15 complaint, to challenge the legality of the Wolf Memo by  
16 including additional claims and plaintiffs. We want to be  
17 sure to move deliberately, giving the effect that this memo  
18 will have on plaintiffs, including people in removal  
19 proceedings and people who have found orders of removals.

20 And we're concerned that the litigation in the  
21 Southern District of Texas not unfairly determined the rights  
22 of plaintiffs here in New York before the Eastern District of  
23 New York has had an opportunity to do so.

24 We have a proposed briefing schedule. Your Honor,  
25 may jointly bide the Batalla Vidal plaintiffs and the state

PROCEEDINGS  
STATUS CONFERENCE

1 plaintiffs, which we shared with the federal Government. And  
2 they've given some feedback on that as well. We hope that  
3 that schedule can move this along appropriately and give the  
4 Government enough time to respond accordingly.

5 THE COURT: What about the proceedings in -- is it  
6 the Southern District of Texas?

7 MR. GHINAGLIA: Yes, your Honor.

8 THE COURT: And what proceedings are ongoing there?

9 MR. GHINAGLIA: So currently the state parties in  
10 Texas V United States are waiting on Judge Hanen to rule on  
11 the state's motion for summary judgment. The states requested  
12 a hearing before the Judge on the week of August 31. As far  
13 as I understand, the Court has not responded to that request  
14 yet. The Court did request a certified copy of the  
15 administrative record of the Duke Memo, which was before this  
16 Court to be filed by August 25.

17 THE COURT: And the issue that is being pursued by  
18 the plaintiffs in that case is, can you describe it for me.

19 MR. GHINAGLIA: Yes, your Honor. Plaintiffs in that  
20 case are seeking a decision on the legality of DACA. Judge  
21 Hanen in that case has weighed in on that question and has  
22 reached that the DACA was unlawful, presumably unlawful.  
23 We're concerned again because the rights and interest of our  
24 plaintiffs here might well be at stake.

25 THE COURT: What is the schedule that you're

PROCEEDINGS  
STATUS CONFERENCE

1 proposing for your amended complaint and your motion practice?

2 MR. GHINAGLIA: So there are two kinds of tracks,  
3 your Honor. On one hand we have the main papers, including  
4 the amended complaint; on the other is the administrative  
5 record.

6 As to the main papers, the Government and plaintiffs  
7 agree that September 10 would be when we would be prepared to  
8 file an amended complaint. And for the Batalla Vidal  
9 plaintiffs motion for class certification and motion for  
10 partial summary judgment on our claim related to the Federal  
11 Vacancies Reform Act. So that's 28 days from now. 28 days  
12 from then we propose having the Government answer and move to  
13 dismiss, presumably oppose class certification, presumably  
14 oppose our motion for partial summary judgment. Then 21 days  
15 after that for plaintiffs to oppose and reply. And 21 days  
16 after that for the Government to reply.

17 I'm happy to give your Honor the specific dates if  
18 that would be more helpful.

19 THE COURT: On this motion practice, let me just  
20 hear from the Government on this proposed schedule including  
21 the application to amend the complaint.

22 MR. PEZZI: Good afternoon, your Honor, Steven Pezzi  
23 from the Department of Justice.

24 So we received plaintiff's scheduling proposal this  
25 morning for the first time. I can say this afternoon that the

PROCEEDINGS  
STATUS CONFERENCE

1       earliest two items on the schedule, as I understand them,  
2       which are a September 10 deadline for an amended complaint in  
3       both cases, and a September 21 deadline for the production of  
4       the administrative record, I think those dates are reasonable  
5       and the Government has no objection.

6                  With respect to the remainder of the schedule, I  
7       think the most efficient course would be for the parties to  
8       have at least a brief opportunity to meet and confer and see  
9       if we can come up with a schedule that works for everyone.

10                 I have some other smaller quibbles with the schedule  
11      that I'm not sure is the best use of your Honor's time for me  
12      to address them today, given our proposal that the parties be  
13      given a chance to meet and confer.

14                 We have no objection to amended complaints in either  
15      case. And we have no objection to a September 21 deadline to  
16      produce an administrative record for the Wolf Memorandum and  
17      commit to working quickly and in good faith with plaintiffs to  
18      come up with a schedule for the remainder of these  
19      proceedings.

20                 THE COURT: How long will it take for the parties to  
21      meet and confer? Certainly I think that's an appropriate  
22      thing to do if we can avoid having back and forth here today.  
23      Can this be done in the next seven days, for instance?

24                 MR. PEZZI: Yes, your Honor, from the Government's  
25      perspective seven days is sufficient.

PROCEEDINGS  
STATUS CONFERENCE

1           THE COURT: And you reach an agreement then you can  
2 simply provide the Court with a joint letter stating that you  
3 reached an agreement on the briefing schedule, or the motion  
4 practice, and we won't need to have another meeting at this  
5 point at least.

6           What is the date that you would want to have the  
7 motion argued? I didn't hear you talk about that.

8           MR. AHMAD: On the schedule that we outlined and  
9 that we sent to the Government, the briefing would be  
10 completed at the end of November. And so we would anticipate  
11 an argument date that would come either the tail end of  
12 November or sometime in December.

13           THE COURT: So let me understand this, the Southern  
14 District of Texas is taking this up in August, and judging  
15 from previous statements by the Judge in the Southern District  
16 of Texas, it's reasonable to conjecture that that Court will  
17 issue a ruling that is adverse to your client's interests. Is  
18 that a fair conjecture on the Court's part?

19           MR. AHMAD: That is, your Honor.

20           MR. GHINAGLIA: Yes, your Honor.

21           THE COURT: And so how would that affect what is  
22 going on here, if at all?

23           MR. GHINAGLIA: There is a possibility, your Honor,  
24 that the decision the Court in Texas will reach DACA  
25 recipients nationwide and that would severely curtail the

PROCEEDINGS  
STATUS CONFERENCE

1 rights and interests of our clients as you've suggested.

2 THE COURT: And that that Court would issue a  
3 nationwide injunction.

4 MR. GHINAGLIA: Correct, your Honor. That it would  
5 reach summary judgment on the claims.

6 MR. AHMAD: Your Honor --

7 THE COURT: Waiting until the end of November to do  
8 anything in this case would appear to me to be trying to look  
9 into a crystal ball. Because depending on the outcome of the  
10 election on November 3rd, the reality of the situation could  
11 shift tremendously and there might be a possibility that we  
12 could have what Judge Grimm was discussing, and that is a  
13 solution developed in the legislature to deal with this issue.

14 So I'm just wondering why prolonging this process  
15 until Christmas makes any sense at all, particularly in view  
16 of the fact that a Court in Texas has this case on the fast  
17 track to a decision. I'm looking at this from a practical  
18 standpoint frankly.

19 We've gone through a lot with this case. It's gone  
20 to the Supreme Court. The Supreme Court has sent it back to  
21 the agency. And now we're setting a schedule that would bring  
22 us to the end of the year.

23 Let me ask this, Mr. Pezzi, do you have any sense of  
24 the schedule that your client is planning to pursue in terms  
25 of developing a solution to the process that the Supreme Court

PROCEEDINGS  
STATUS CONFERENCE

1 has stated was inadequate? In other words, does your client  
2 have a schedule? Your client issued an eight-page memorandum  
3 a few days after the meeting with the District Judge in  
4 Maryland, and now we're here looking at that memorandum. What  
5 is next and when is it coming, is my question.

6 MR. PEZZI: Your Honor, I am not able to offer any  
7 precise timing on that. I'm not aware of any imminent changes  
8 to the policy. As of now I think everyone agrees that the  
9 current policy is governed by the Wolf memorandum, that is a  
10 new agency action that plaintiffs can attempt to challenge  
11 under the Administrative Procedure Act, as the Supreme Court  
12 noted. I think everyone agrees that the agency can make  
13 changes to the DACA policy in either direction in whole or in  
14 part. It has made certain immediate partial changes, although  
15 it has kept the core of the program in tact until further  
16 notice.

17 The Government believes the Wolf memorandum complies  
18 with the Administrative Procedure Act and meets the  
19 requirements it needs to meet under the law. If plaintiffs  
20 disagree with that, they may, as they are attempting to do,  
21 amend their complaints to challenge the Wolf memorandum.

22 THE COURT: Mr. Ghinaglia, do you want to speak to  
23 that?

24 MR. GHINAGLIA: The Wolf memorandum by its terms  
25 claims to retain the court DACA and return to the status quo.

PROCEEDINGS  
STATUS CONFERENCE

1 Our concern is that the court DACA is to allow people who meet  
2 the criteria in the 20-fold memo to apply to DACA and receive  
3 it. That seems to be the status quo envisioned by the Supreme  
4 Court's decision, by the Court's mandate, by the District of  
5 Maryland's order. It's the program as it existed on  
6 September 4, 2017 before the rescission.

7 As Mr. Pezzi noted, that's the reason why we are  
8 challenging this new memorandum.

9 THE COURT: All right.

10 MR. AHMAD: May I speak to the timing question, your  
11 Honor?

12 THE COURT: Who is peeking now.

13 MR. AHMAD: This is Muneer Ahmed.

14 THE COURT: Professor, yes.

15 MR. AHMAD: Thank you, your Honor. With regard to  
16 timing, the plaintiffs -- I just say the schedule that we sent  
17 to the Government, the Government's initial response was that  
18 they thought it was too fast -- (video interruption) -- the  
19 Court is inclined to do so. One thing that we could do right  
20 off the bat is to meet and confer tomorrow with the Government  
21 and have something filed with the Court, either joint schedule  
22 or separate schedules, for the Court to consider by Monday or  
23 Tuesday of next week.

24 But looking ahead, if the Court is inclined to  
25 adjudicate this case on a faster track, the plaintiffs are

PROCEEDINGS  
STATUS CONFERENCE

1 amenable to significantly revising the schedule in order to  
2 create that opportunity.

3                 And to say two things, one, as we did the last time  
4 around, our intention here is to move via class. That does  
5 distinguish our case from our case in the Southern District of  
6 Texas. Second, just to remind the Court that when we first  
7 came to you with regard to the DACA program, it was in the  
8 light of a decision from the Southern District of Texas that  
9 was determining the rights of DACA recipients in New York.  
10 And we were at that point advancing theories about why and  
11 arguments why this Court could determine those rights  
12 notwithstanding an order from the Southern District of Texas.  
13 If we end up in a situation, your Honor, where the Southern  
14 District of Texas does move quickly and issues a ruling  
15 adverse to our clients, then that's an avenue that I think  
16 that we may need to revert to again.

17                 THE COURT: All right. Before I hear from the  
18 Government again, let me hear from you, Ms. Khan, would you  
19 like to weigh in on your requests?

20                 MS. KHAN: Yes, your Honor, thank you.

21                 I think that pretty much what the Batalla Vidal  
22 plaintiffs have stated is pretty much in line with what  
23 plaintiff's state position is. Obviously we not be  
24 participating in the class certification motion, but  
25 otherwise, timing wise we are on the same page. And as Muneer

PROCEEDINGS  
STATUS CONFERENCE

1 just stated, if your Honor wants, if your Honor is willing to  
2 adjudicate this quickly, we are happy to amend the schedule on  
3 that basis as well.

4 THE COURT: Well, November is too late, so let's  
5 start with that. And I'm not -- especially if there is a  
6 decision issued in another district that might affect the  
7 plaintiffs in this case tangentially or directly. It is  
8 essential, there are thousands and thousands of potential  
9 class members in the Second Circuit, perhaps in the Eastern  
10 District of New York, and the rights and of those individuals  
11 are foremost in the Court's thinking right now. And I think  
12 that we should make every effort to reach an initial  
13 determination that can be reviewed on appeal at the earliest  
14 possible time.

15 This case has remained unresolved and there are  
16 700,000-plus people who are directly affected. There are  
17 individuals whose applications are sitting in a lock box  
18 somewhere, whose applications were not dealt with during the  
19 period between the Supreme Court decision in June and the Wolf  
20 memorandum toward the end of July. There was nothing during  
21 that period that would have barred the agency from moving with  
22 alacrity to resolve the applications that had been submitted.

23 And now we have the Wolf memorandum, which is deemed  
24 to be by the agency an interim solution. But there are  
25 arguments on both sides as to whether it is an interim

PROCEEDINGS  
STATUS CONFERENCE

1 solution that is not deserving or subject to judicial review  
2 or whether it is something else.

3 So we have a lot, we have many open questions here  
4 that need to be resolved and should be resolved promptly, in  
5 my opinion.

6 Before I go on to giving you a little bit of time to  
7 set a schedule, I noted that the USCIS, is that the U.S.  
8 Customs and immigration Service, is that right, in the  
9 Department of Homeland Security issued a press statement, the  
10 Regents decision by the Supreme Court stating that the opinion  
11 had no basis in law. I'm just wondering, how the decision by  
12 the Supreme Court could be deemed by a federal agency --  
13 (video interruption) -- law.

14 Can you explain that to me, Mr. Pezzi?

15 MR. PEZZI: Your Honor, all I can say about that is  
16 that obviously the Regents decision is the law. The  
17 Government is complying with the Regents decision and will  
18 continue to comply with the Regents decision.

19 THE COURT: Think perhaps the Attorney General  
20 should advise that his client, Mr. Wolf, that it is not  
21 beneficial to anyone to have a federal agency take issue with  
22 a decision of the Supreme Court. And I'm very troubled by  
23 anyone who would write such a thing on a document issued by a  
24 federal agency regarding a decision by the U.S. Supreme Court,  
25 or any court, until it's overruled or reversed, any federal

PROCEEDINGS  
STATUS CONFERENCE

1 court at least.

2 So I just raise that, and I was deeply concerned  
3 about it.

4 Sadly, many times something like that happens. It  
5 undermines the rule of law. And we should not be in a  
6 position of having to ask the Justice Department to clarify  
7 whether this is the opinion of the Government or not.

8 Let's get back to the schedule. I'm going to grant  
9 the motion to amend in both cases. And I'm going to follow  
10 the suggestion which was made by Professor Ahmed that the  
11 parties should meet and confer on the schedule.

12 COURTROOM DEPUTY: Please keep your phones and  
13 computers on mute, please.

14 THE COURT: Thank you. A meeting confer and advise  
15 on the schedule for the motion practice for both the filing of  
16 the amended complaints and the motion practice. And advise  
17 the Court in writing no later than next Wednesday on any  
18 agreed to schedule, or if there is no agreement on the  
19 schedules that the different sides would wish the Court to  
20 issue.

21 What else do we have for today?

22 MR. AHMAD: Your Honor, I just wondered if in the  
23 interest of trying to move along if we might be able to get  
24 the -- (video interruption) -- faster than.

25 THE COURT REPORTER: You're breaking up. I can't

PROCEEDINGS  
STATUS CONFERENCE

1 hear you.

2 MR. AHMAD: I was saying that in the interest of  
3 trying to move along what can be moved along at this point, I  
4 wondered if we would able to get the administrative record  
5 faster than Mr. Pezzi has agreed to in this hearing thus far.

6 THE COURT: What I would like to do is have  
7 Mr. Pezzi confer with his client to see how quickly that can  
8 be done. And if you have a dispute on that subject, Mr. Pezzi  
9 can advise the Court on why the schedule he proposes is the  
10 one, your views on advancing that schedule. So that we can  
11 have that discussion after the agency has an opportunity to  
12 give it some thought.

13 MR. AHMAD: Thank you, your Honor.

14 THE COURT: Mr. Pezzi, do you have anything else for  
15 today?

16 MR. PEZZI: Nothing further from the Government,  
17 your Honor.

18 THE COURT: And Mr. Ghinaglia, do you have anything  
19 else for today?

20 MR. GHINAGLIA: No, your Honor thank you.

21 THE COURT: Ms. Khan?

22 MS. KHAN: No, your Honor. Thank you.

23 THE COURT: All right, if we need to have an  
24 additional meeting, we'll do it next Thursday at 2:00 p.m.  
25 Just jot that down on your calendars. I don't want you to be

PROCEEDINGS  
STATUS CONFERENCE

1 far afield next Thursday; but if on Wednesday I see that we  
2 need to meet again on Thursday, I don't want to surprise you  
3 with a meeting for next Thursday. That way we can discuss  
4 anything that still needs to be resolved procedurally we can  
5 resolve at that point.

6           But it is my, I will repeat, it is my wish that this  
7 case move very quickly and that all of the people who are  
8 affected by the changes that have been made in the program  
9 since it was first instituted in 2013 and then rescinded, that  
10 all of that can be resolved sooner than November, the end of  
11 November or December of this year.

12           Thank you everyone have a nice day.

13           (Whereupon, the matter was concluded.)

14                                 \*       \*       \*       \*       \*

15 I certify that the foregoing is a correct transcript from the  
16 record of proceedings in the above-entitled matter.

17 Rivka Teich, CSR RPR RMR FCRR  
18 Official Court Reporter  
19 Eastern District of New York

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